Quo Vadis Domine: Reflections on Individual and Ethnic Self-Determination under an Emerging International Legal Regime

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I. Introduction

It is time for scholars to reassess the question of Quo Vadis Domine in light of the global economic and political changes resulting from the migration of individual and culture. The issues of freedom of movement and freedom of admission have become paramount in the last few years of the twentieth century. In the mid-twentieth century, after the devastating Second World War, there was a consensus that these migrating people should be recognized as a special class of human beings called political refugees, who should be given special status under public international law. The consensus was that such political refugees should have freedom of movement, including freedom of admission to other nation-states. This view was promulgated as a right under the Geneva Convention and later became part of customary international law.[1]

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1. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Status of Refugees]. The following countries are parties to the agreement: Algeria, Angola, Argentina, Australia, Austria, Belgium, Benin, Bolivia, Botswana, Brazil, Burkina Faso, Burundi, Cameroon, Canada, Central African Republic, Chad, Chile, China, Columbia, Congo, Costa Rica, Cyprus, Denmark, Djibouti, Dominican Republic, Equador, Egypt, El Salvador, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Federal Republic of Germany, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau, Haiti, Holy See, Iceland, Iran, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Lesotho, Liberia, Liechtenstein, Luxembourg, Madagascar, Mali, Malta, Monaco, Morocco, Mozambique, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Portugal, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, Spain, Sudan, Surinam, Sweden, Switzerland, Tanzania, Togo, Tunisia, Turkey, Uganda, and Zimbabwe. *See also* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 35 I.L.M. 1335. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 302, 6 I.L.M. 383; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. The following countries are parties to the preceding agreements: Belgium, Denmark, Federal Republic of Germany, Greece, Iceland, Ireland, Luxembourg, Netherlands, Norway, Sweden, Turkey, and United Kingdom. American Convention on Human Rights, O.A.S. Official Records OEA/SER. K/XVI/1.1, Doc. 65 Rev. 1, Corr. 1, Jan. 7, 1970, 9 I.L.M. 673, 65 A.J.I.L. 679 (effective June 16,

The definition of political refugee is a narrow concept of fundamental values cherished by the international community. Today, this definition requires reassessment in light of the dramatic changes in the post-Cold War era. The collapse of communist rule in Eastern Europe released a tremendous energy in the population, sentiments formerly under oppression by Marxist regimes. One of the hallmarks of the Cold War in Eastern Europe was the denial of the fundamental human right of freedom of movement. The Iron Curtain was built to physically prevent the free exercise of movement and migration.[2]

The United States has led the West in expressing concern with this blatant denial of basic human rights. The United States made every effort to improve the freedom of movement and to promote it as a fundamental human right. Certain national ethnic groups, particularly the Jewish population in Russia and Eastern Europe, were targeted. In 1974, the U.S. Congress adopted the Jackson-Vanik Amendment, which became a major political and economic issue in the last decades of the Cold War. Under the Jackson-Vanik Amendment, most-favored-nation status, as well as basic export-import bank credits, were denied to the non-market economy countries that created impediments to the fundamental human right of freedom of movement.[3] In other words, trading status was linked to freedom of emigration.

This American legislation was a major impetus in the delay of Cold War relaxation until the late 1980s. It was then, under the leadership of Gorbachev, that the freedom of movement was restored to the people of Russia and Eastern Europe.[4] This dramatic turn of

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1979); Banjul Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58. Conference on Security and Co-Operation in Europe: Final Act, DEP'T OF STATE PUBLICATION 8826, 14 I.L.M. 1292. The Conference on Security and Cooperation in Europe, which opened in Helsinki on July 3, 1973, and continued at Geneva from September 18, 1973, to July 21, 1975, was concluded at Helsinki on August 1, 1975, by the High Representatives of Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, Federal Republic of Germany, Greece, Holy See, Hungary, Iceland, Ireland, Italy Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States, and Yugoslavia. *Id. See also* R. LILLICH, U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES (1981).

2. *See generally* Francis A. Gabor, *Reflections on the Freedom of Movement in Light of the Dismantled "Iron Curtain,"* 65 TUL. L. REV. 849–66 (1991).

3. Trade Act of 1974, Pub. L. No. 93–618, 88 Stat. 1978 (1975) (codified as amended at 19 U.S.C. §§ 2101–2487 (1988)). The House bill provided that no country shall be eligible to receive nondiscriminatory tariff treatment or U.S. governmental credits, credit guarantees, or investment guarantees if the president determines that such country:

> 1. Denies its citizens the right or opportunity to emigrate;
> 2. imposes more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatsoever; or
> 3. imposes more than a nominal tax, levy, fine, fee or other charge on any citizen as a consequence of the desire of such citizen to emigrate . . .

H.R. 10710, 93d Cong., 1st Sess. § 402 (1974). Section 403 authorizes the president to grant most-favored-nation treatment to non-market-economy countries by entering into bilateral agreements with these countries or by their entrance into an "appropriate multilateral agreement" to which the United States is also a party. *Id.* § 403. Section 404 provides nondiscriminatory treatment in commercial agreements whenever such agreements would promote the purposes of the bill and are in the national interest. *Id.* § 404. There is, however, a restriction of a three-year time period with possible renewal. *Id.* Section 406 delineates the procedure for congressional disapproval of any proclamation under Section 403 and permits annual congressional review of continuances of nondiscriminatory treatment. *Id.* § 406.

4. *See* Gabor, *supra* note 2, at 877–78.

events emerged when the traditional Marxist ideology regarding preservation of the population within the nation-state was questioned. As a consequence of this new freedom of movement, pressure increased for admission into Western Europe and the United States.

II. Reflections on the Freedom of Movement as a Right for Personal Self-Determination

A. The Right of Personal Self-Determination

The global world order for the twenty-first century is being built upon the historical experience of multi-cultural societies in spatial coexistence. The roots of tribal psycholinguistic group identity have their origin in distant millenniums.

These personal identities survived over the centuries. Following the Westphalian peace treaty in 1648, the modern concept of the sovereign nation-state was born and public international law has developed to harmonize and prevent conflicts among these new actors in human history.

The nation-state, however, did not follow the ethnic identity of the human subjects as the controlling criteria. Therefore, the map of the post-Westphalian Europe showed a mosaic of sovereign powers controlling multiethnic societies. This puzzle has created tension and conflicts within the nation-state system for the last 350 years of human history.

A new approach should be adopted based on the recognition of an internationally protected right to personal self-determination. The concept of a nation-state should be expanded to individuals as a fundamental human right. Every human being has a right to freedom of movement, which is clearly recognized in Article 13 of the Universal Declaration of Human Rights[5] and further developed in the Covenant of Civil and Political Rights.[6] This right requires an analysis of these provisions and their drafting histories. In the midst of the devastating Second World War, millions of displaced persons sought admission to countries where they could settle and find a new home. The concept of freedom of movement included the freedom of an individual to leave his or her country and enjoy the right to return.[7]

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5. *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

6. International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 99 U.N.T.S. 171 [hereinafter International Covenant].

7. *Id.* The covenant was entered into force on March 23, 1976. The following states are parties to the agreement: Afghanistan, Austria, Barbados, Belgium, Bolivia, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Central African Republic, Cameroon, Chile, Columbia, Congo, Costa Rica, Cyprus, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Finland, France, Gabon, Gambia, German Democratic Republic, Federal Republic of Germany, Guinea, Guyana, Hungary, Iceland, India, Iran, Iraq, Italy, Jamaica, Japan, Jordan, Kenya, Democratic People's Republic of Korea, Lebanon, Libya, Luxembourg, Madagascar, Mali, Mauritius, Mongolia, Morocco, Netherlands, New Zealand, Nicaragua, Norway Panama, Peru, Poland, Portugal, Romania, Rwanda, Sweden, Syria, Tanzania, Togo, Trinidad and Tobago, Tunisia, Ukrainian Soviet Socialist Republics, United Kingdom, Uruguay, Venezuela, Viet Nam, Yugoslavia, Zaire, and Zambia.

This covenant provides the following legal assurances in Article 12:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
> 2. Everyone shall be free to leave any country, including his own.
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or

Traditional public international law places state sovereignty as a stumbling block in the way of the freedom of admission. A narrow class of migrants receive the internationally guaranteed right of admission if they can be characterized as political refugees. Refugee has been defined under standards that emerged during World War II and led to the Geneva Convention on the Status of Political Refugees and the subsequent Protocol.[8]

B. Right of Admission and National Sovereignty

The admission of an alien to a national territory is the exercise of the protected right of sovereign jurisdiction. Sovereign jurisdiction is a fundamental barrier to achieving freedom of movement and is also a barrier to exercising the right of personal self-determination. In practical terms, the reasons for a person to leave his or her home country can be many-faceted. The decision to leave a presumably psychologically and linguistically familiar environment is truly a traumatic one.[9] Such a decision is often made in the context of suffering some intolerable condition. One of the most recognized forms of intolerable conditions is the fear of persecution on the basis of race, religion, nationality, membership in a certain social-political group, or the expression of certain political ideas. These are the only grounds that have received recognition under public international law. [10] However, there are many other highly personal and significant reasons that may force an individual to exercise the basic human right of self-determination. The forces that create the pattern for human

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morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. . .

Article 13 provides the following legal assurances:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The Universal Declaration of Human Rights, *supra* note 5, was adopted by the U.N. General Assembly on December 10, 1948. Forty-eight states voted in favor, none against, and eight abstained (including Saudi Arabia, South Africa, Union of Soviet Socialist Republics, and Yugoslavia). On the topic of freedom of movement, the agreement provides the following:

> Article 13
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> 1. Everyone has the right to freedom of movement and residence within the borders of each state.
> 2. Everyone has the right to leave any country, including his own, and to return to his country.
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> Article 14
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> 1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
> 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

The opinion juris communis establishes that Articles 13 and 14 have binding legal value as interpretarions of the U.N. Charter, Articles 55 and 56, or as customary norms of international law. *See* Restatement (Second) Foreign Relations Law of The United States § 702 (1983).

8. *See* Status of Refugees, *supra* note 1.

9. A. Portes & J. Borocz, *Contemporary Immigration: Theoretical Perspectives on its Determinants and Modes of Incorporation*, 23 Int'l Migration Rev. 606, 607–14 (1989).

10. *See* Wildes, *The Dilemma of the Refugee*, 4 Cardozo L. Rev. 353, 360–77 (1983).

migration cannot be disregarded by the international community. International law should address and analyze the multifaceted interests involved in the migration process.

In this context, three levels of interests must be considered. First, the individual's interest in making decisions regarding his or her own self-determination. Second, the vital interest of the country where the individual has his native citizenship and domicile. Third, the interest of the country of immigration, where the alien is attempting to make an application for admission to settle as an immigrant permanent resident.

C. Interest of the Individual in Personal Self-Determination

Persecution on the basis of the criteria discussed above leads to the status of political. This status is the only recognized status that provides the right of admission to another country under public international law. In real life, however, there are other more complex reasons compelling individuals to exercise the right of personal self-determination in leaving their home country.[11] Family unification is a fundamental human right of every individual under customary international law. During the Cold War period a most debated topic was whether to guarantee family unification and the freedom of movement, at least among family members. Family unification is a fundamental interest that has been recognized by immigration systems in most developed countries. The United States had opened its doors to different levels of family unification.[12] Family immigration is the major source of legal immigration in the United States.

The most controversial interests motivating individual migration are economic conditions in the home country. As most of the world population is suffering under oppressive economic conditions, with low standards of living and repressed economic opportunities, human migration remains a viable remedy.[13]

Analyzing individual decision-making requires a consideration of the interplay of push-pull factors that are recognized by leading authorities in migration theory. Economic conditions are gradually getting worse, unemployment is on the rise, and wages and working conditions are deteriorating. These factors create an environment that pushes individuals to decide to migrate.[14] These push factors can be commonly observed not just in different parts of the developing world, but also in Central Eastern Europe. There has been a period of great disappointment in Central Eastern Europe in which individuals were inspired by the expectation of a high level of democratic capitalist development within the near future.

In 1989, an era of high expectation began in Central Eastern Europe in which citizens were hoping that privatization and foreign investment would lead to a fast transition into a market economy. Central and Eastern Europeans anticipated that their countries would soon enjoy the better living standards, opportunities and customs found in the European Union. By the mid-1990s it became evident that the transition would take much longer than anticipated. This realization led to great disappointment and resentment.[15] As a result,

11. *Id.*

12. *See generally* John W. Guendelsberger, *Implementing Family Unification Rights in America Immigration Law: Proposed Amendments*, 25 San Diego L. Rev. 253–55 (1988).

13. George J. Borjas, Friends or Strangers: The Impact of Immigrants on the U.S. Economy 7–18 (1990).

14. *Id.*

15. *See generally* Francis A. Gabor, *The Quest for Transformation to a Market Economy: Privatization and Foreign Investment in Hungary*, 24 Vand. J. Transnat'l L. 303 (1991).

the people exercised their political self-determination and re-elected the reform communist political parties all over Central Eastern Europe. These parties considered themselves to be reformed communists and tried to label themselves as social democratic parties. They attempted to preserve some form of security for the population, which was accustomed to strict government controls during the forty years of Marxist domination in that area of the world.[16]

The demand for emigration from countries of Central Eastern Europe is most significant. Most of these countries enacted legislation in the late 1980s or early 1990s guaranteeing freedom of emigration for their citizens. Under public international law, the freedom of movement is well recognized all over Central Eastern Europe.[17] A definite economic push factor is motivating people in the region to leave their countries.

The bloody civil war in the former Yugoslavia is also creating a tremendous amount of refugee flow to the countries of Western Europe and to the United States.[18] These problems have to be fully addressed and analyzed in the countries that might admit these immigrants. Very few steps have been taken to address this new potential migration movement from Central Eastern Europe due to the transition that has occurred in the last seven years.[19] It is important to reassess the interests of countries of immigration in the light of this new flood of migration from Central Eastern Europe.

D. Freedom of Movement in Legislative Implementation: The Hungarian Model[20]

The Iron Curtain fell on the western and southern borders of Hungary after 1949 with the Communist take-over of the country. One of the most characteristic symptoms of the Stalinist and Post-Stalinist model, until 1987, has been manifested by the denial of or rigid restriction on the basic human right of freedom of movement. While Hungary joined to the Covenant on Civil and Political Rights in 1976, the implementation of the basic human right of freedom of movement was not consistent with the requirements of the international legal obligation under the Convention.[21] The parliament governing this area made no stated effort. The minister of interior was given broad discretion in the administration of immigration and migration matters.[22]

The historical, political and socio-economic changes since 1987 had a direct impact on the full recognition of the freedom of movement in Hungary. Hungary took broad steps in 1987 and 1988 to provide a so-called world passport for its citizens that permitted the freedom of travel with a time limitation, which is approximately five years.[23] At the same time in 1988, the physical structures of the Iron Curtain were demolished.

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16. *Id.*

17. *See* Gabor, *supra* note 2, at 854–55.

18. Paul C. Szasz, *Protecting Human and Minority Rights in Bosnia: A Documentary Survey of International Proposals* 25 Cal. W. Int'l L.J. 237 (1995).

19. *Id.*

20. Act XXIX of 1989 on Emigration and Immigration (Hung), 71 Magyar Kozlony (Hungarian Official Gazette) 1200–04 [hereinafter Act XXIX].

21. *See* International Covenant, *supra* note 6.

22. *See* Gabor, *supra* note 2, at 855–61.

23. Act XXVIII of 1989 on Travel Abroad and Passports, 71 Magyar Kozlony (Hungarian Official Gazette) 1195–1200 [hereinafter Act XXVIII of 1989]. Article 1 of the Act emphasizes that the travel abroad, return to home, and the right to passport have to be considered a basic human right that can only be limited according to the act. Every provision fully consistent with the requirements of the International Covenant on Civil and

After several months of preparatory work, a new comprehensive statute on the freedom of movement was enacted in October 1989.[24] The preamble of the statute emphasizes that the purpose of the enactment is to achieve full compliance with Hungary's international legal obligations undertaken by the ratification of the Covenant on Civil and Political Rights in 1976. Paragraph I refers to article 13, paragraph 1 of the Covenant stating that every Hungarian has the right to choose freely his place of domicile and has the freedom to immigrate from and to return to Hungary.[25] This basic human right may only be limited in the exceptional cases specifically stated in the statute. No other statute or law of registration may restrict the inherent human right of freedom of movement.

While Hungarian citizens enjoy this basic human right, Hungarian citizens may only immigrate to Hungary with permission and under the conditions specifically stated by the Act. Under the Act, a non-Hungarian citizen includes a stateless person.

Articles II through IV provide detailed regulations of the immigration framework. Hungarian citizens now have the right to immigrate; therefore, the only requirement is to appear in person and express an intent to emigrate by filling out the appropriate forms and returning them to the authorities.[26] The forms must be attached to a report on the intent to emigrate. If the immigrant has no statutory impediment, he or she will receive written

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Political Rights. *See* Portes, *supra* note 9. Thus, the restrictions are clearly stated in article 2. Specifically, a person cannot leave the country until the conclusion of criminal proceedings if criminal proceedings are already started for a crime requiring a sentence over three years. If the person has already been sentenced for three years or more, that person cannot leave the country until the sentence is served. Another category of restrictions relates to persons who are in the possession of state secrets. They cannot leave the country for a three-year period, if they are in the possession of a qualified secret affecting national security. They can ask, however, for exemptions from the particular administrative agency.

Paragraph 3, section 2 guarantees that the passport is valid for all the countries in the world for five years and this period can be extended. All Hungarian citizens are entitled to a private passport. They have the basic right to obtain a passport from the local administrative agencies. Paragraph 16 provides legal remedies and appellate proceedings against the administrative agencies' decisions denying the passport. The first step is an appeal to the appropriate administrative agency whose decision can be reviewed at court within thirty days. The court will make the final decision after uncontested proceedings within thirty days after the filing of the action.

24. *See id.* pmbl. § (1).

25. *See id.* pmbl. § 1(1).

26. *See id.* art. II, which provides:

> 1. The intention to immigrate should be reported by submitting a form to the authorized office or to the Hungarian foreign representation. In case of applicants, who are minors, only their legal representative can submit the application.
> 2. The following submissions are required with the emigration request:
> (a) Statement by the applicant as to whether or not he has a public debt.
> (b) If the prospective emigrant is liable for military or civil service under the regulation of general military conscription, a permission to emigrate issued by the Ministry of Defense.
> (c) If the applicant is incapable or has restricted disposing, capacity, a court decision or consent to emigrate by the guardianship authority, unless the minor emigrates with both parents;
> (d) If the applicant has a dependent relative who is incapable or who has restricted disposing capacity or an adopted person remaining in Hungary, permission to emigrate issued by the guardianship authority.
> 3. If there are no legal restrictions to the emigration, the petitioner should be notified in writing.
> 4. If there are legal impediments to the emigration, the impediments and restriction period should be stated in a written decision.

notice immediately. Similarly, the individual will receive written notice if any statutory impediments are discovered by the authorities. Once the right to immigrate is achieved, it must be recorded on the immigrant's passport.[27]

Article IV of the statute establishes limitations on the inherent right of emigration. Thus, persons who are subject to criminal prosecution for serious crimes—crimes punishable for at least three years imprisonment—cannot emigrate. The right of emigration is limited for persons who owe public debts and have not made arrangements for full repayment. A person who is under military draft and does not receive specific permission from the Minister of Defense cannot leave the country.[28] Persons who lack legal capacity or have limited legal capacity, such as minors and the mentally ill, cannot leave the country without the permission of the appropriate authorities. Finally, persons who are in possession of certain state secrets that must be protected for the national interest cannot leave the country any time within three years from the date of possession of the state secret. In exceptional cases, the appropriate authorities can re-examine the existence of the national interest.[29]

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27. *See id.* art. III, which provides:

    1. Entitlement to emigrate should be indicated in the passport.
    2. The endorsement condition is:
        (a) A valid passport;
        (b) Termination of permanent residence in Hungary with appropriate police authorities;
        (c) Surrender of identification card to the police at place of residence;
        (d) Persons of draft age must possess a certificate from the regional replacement center verifying announcement of his intention to emigrate;
        (e) Certification not older than 30 days issued by the city council having jurisdiction over the place of residence, the internal revenue service, and the social security directorate stating that the prospective emigrant has no debts, or that payment of such debts is properly guaranteed.
    3. Emigration entitlement may not be indicated in the passport if there is legal impediment to emigrate, and the passport must be revoked if such impediment develops.
    4. Refusal and revocation of emigration entitlement shall be included in a written notification.

28. *See id.* art. IV. Section 1 provides:

    1. Emigration may not be granted to those who are:
        (a) Undergoing criminal proceedings for a crime punishable by more than a three-year imprisonment, until the completion of criminal proceedings;
        (b) Sentenced to imprisonment, until the jail sentence is served;
        (c) Have public debts, i.e., tax or social security contribution, until such debts have been paid or payment of such debts is guaranteed;
        (d) Liable for military or civil service under the regulation of the general military conscription, and the minister of defense has not authorized leave;
        (e) With the exception of a minor emigrating with both parents, incapable or have restricted disposing capacity and have not received the consent to emigrate by the guardianship authority;
        (f) Not able to properly guarantee the support of a dependent who is incapable or has restricted disposing capacity and will remain in the country.

    Id.

29. *See id.* art. IV. Section 2 provides:

    Emigration may not be granted to those possessing a state secret, the safeguarding of which is highly desirable for national safety. This restriction may exist for up to three years from the date one ceases to possess the state secret. The applicant may request reconsideration of the decision from the qualified person of whether or not an extremely important state secret exists in the case.

    Id.

Article V of the statute guarantees all Hungarian citizens living abroad the right to return home.[30] They can exercise this right at any time and it cannot be limited. Guaranteeing the right of return is particularly important for a number of Hungarians who left their country before 1956 and wish to retire in their homeland.

Hungarian citizens who return home will be considered domiciled in Hungary even if they acquired foreign nationality. The Hungarian law on citizenship is extremely generous in that it allows Hungarians to maintain their citizenship even if they have acquired foreign nationality. Therefore, most of the Hungarians who left after 1956 enjoy dual citizenship under this provision of Hungarian law. After their return, they will enjoy full status as Hungarian citizens. Under public international law, their dual citizenship probably will be recognized.[31]

The statute also includes the legal remedies available to enforce the basic rights it guarantees. Particularly, article XI provides a right to appeal to a higher ranking administrative agency when the application for emigration initially is denied.[32] After all administrative remedies are exhausted, the statute provides a right to petition the judicial branch. The court having subject matter jurisdiction must make a decision within thirty days after the application is received in a non-contested proceeding. The court will provide concurrent notification of the appeal results to the applicant and the proper administrative agency. No further recourse is available.[33]

III. International Legal Perspective on Ethnic Self-Determination in Eastern Europe

A. Reassessment of Ethnic and Personal Self-determination in Eastern Europe

One of the greatest challenges for post-Cold War Eastern Europe lies in the unresolved questions of ethnic self-determination. The unprecedented human tragedy of two world wars did not resolve these questions. The Marxist-dominated regimes in Eastern Europe made extraordinary efforts to ignore and oppress any open debate on the question of ethnic self-determination.[34] The turning point came with the unexpectedly fast collapse of com-

30. *See id.* art. V. Section 1.

31. *See* Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6).

32. *See* Act XXVIII of 1989, *supra* note 23, art. XI provides:

> 1. There is administrative appeal from decisions to the denying of emigration and immigration permits, withdrawal of an immigration permit or identification card entitling permanent settlement in Hungary.
> 2. A request for reconsideration can be submitted within 30 days to the court issuing the administrative decision made on second degree.
> 3. Within 30 days upon receipt of such request, the court must issue a decision as a result of a non-trial procedure permitting the participation of lawyers and interviews of the applicants. If the court approves the request, it repeals the decision of the state administration organ, if not, it refuses it. The court simultaneously notifies the applicant as well as the state administration organ of its decision. There is no legal remedy from the court.

Id.

33. *See id.* art. XI.

34. *See* C. Brolmann et al., Peoples and Minorities in International Law 3–27 (1993).

munist control as the velvet revolution swept across in the region between 1988 and1990. The astonishing pace of political transformation has not been accompanied by balanced economic transition to free market economies. Most countries have suffered unprecedented economic crisis. [35] Ethnic conflict has re-emerged as the ongoing economic crisis has weakened the political central authority.

From a historical perspective, this ethnic conflict is the result of the persistence of this unresolved question: how to protect ethnic minorities living in the territory of another sovereign nation-state when the borders of nation-states do not necessarily follow the historical settlement of ethnic populations. After each world war, people and national borders were artificially rearranged, disregarding any effective protection of ethnic minorities.[36] Therefore, the issues of ethnic and personal self-determination remain to be addressed by the global community of nations in the post-Cold War era.

B. Special Correlation Between Ethnic and Personal Self-Determination

In classic public international law, the individual human being, or the individual ethnic group, did not receive any particular protection. Thus, state sovereignty dominated over any claims for individual or ethnic self-determination.

In the midst of the devastating tragedy of the Second World War, the human being's special inalienable right to international protection emerged. Following the adoption of the United Nations Charter, a new body of customary international law developed for the purpose of protecting human rights.

The concept of the fundamental human right of personal self- determination has been recognized in article 55 of the United Nations Charter,[37] and it has received authoritative construction by several widely accepted United Nations General Assembly Resolutions. During the 1960s, colonial demands for independence were fostered by widespread recognition of the doctrine of national self-determination. Some scholars even believe that this principle has achieved the force of a peremptory norm, reflecting world public policy.[38]

At the same time, ethnic self-determination for minorities living within sovereign nation-states has not received support from international scholars and experts. In this context, the notion of self-determination was subordinate to the static principle of *uti possidetis* or territorial integrity.[39] The Helsinki Final Act emphasized the viability of the post-World War II boundaries of Eastern Europe that were part of the Yalta Agreement. The preservation of the status quo on the basis of the transitional separation of the spheres of influence since 1945 had been a binding principle until 1989.[40]

After 1989, the sudden collapse of both the external and internal Marxist central authorities created a dangerous power vacuum in Eastern Europe. The struggle for ethnic self-determination became the dominant ideological force in the course of the disintegration of the Soviet Union and Yugoslavia. The Yugoslav tragedy offers the most challenging

35. *See id.* at 29–35.

36. *See id.* at 77–101.

37. *See generally* Louis B. John, *The United Nations at Fifty: How American International Lawyers Prepared for the San Francisco Bill of Rights*, 89 Am. Int'l L. 540, 540–53 (1995).

38. *See* Brolmann, *supra* note 34, at 38–53.

39. *See id.* at 59–70.

40. *See* A. Classe et al., The International System After the Collapse of the East-West Order 54–60 (1994).

case for the new approach to the different levels of self-determination in the post Cold War period.[41] In Yugoslavia, it became obvious that territorial integrity and ethnic self-determination could not be reconciled peacefully in the midst of the collapse of the central political and economic authorities. The struggle for ethnic self-determination led to genocide and ethnic cleansing. People retracted into their tribal stage in an attempt to destroy historical human realities.[42] Thus, the vague notion of ethnic self-determination has become a destructive force.

After four years of bloodshed, a fragile peace process, or rather an extended cease fire, in Bosnia-Herzegovina occurred with the implementation of the Dayton Peace Accord.[43] The critical stage in this process has to arise from a new approach to the root causes of the conflict over ethnic self-determination.[44] In this context, two models are possible: the internationally protected constitutional ethnic self-determination model envisioned by the Dayton Peace Accord and the personal self-determination model, which would only protect the fundamental human rights of individuals.

C. The Internationally Protected Constitutional Ethnic Self-Determination Model From a Historical Perspective

Upon the conclusion of the devastating First World War, a new political social reality emerged from the ruins of the disintegrating empires of Eastern Europe. People searched for cohesive inner forces in a cry for self-determination. As world orders ended, central authorities collapsed and the renaissance of ethnic identity led the movement for national self-determination. The old map of Central-Eastern Europe was carved into more homogeneous nation-states. Czechoslovakia, Romania and Yugoslavia emerged through the self-determination of each country's constituents and each declared its own state.[45]

As the Versailles Treaty system arbitrarily changed national territories and borders, the seeds of the second world war were planted. All attempts to create reliable protections for ethnic minorities failed.[46] There were very few attempts to create some level of protection under International Law. However, minority treaties under the supervision of the victorious Antant powers were within bilateral treaties and were entered into between the newly emerged nation-states and successor states of the disintegrating Austro-Hungarian Empire.

The minority treaties were between Poland, Croatia and Slovain Kingdom, Czechoslovakia, and Greece. These treaties theoretically provided very attractive protection for the collective rights of nationals.[47] The treaties guaranteed the full protection of life and liberty without discrimination. These freedoms included the exercise of religion, and basic civil and political rights. Minorities were entitled to use their own languages and establish their own schools and other charitable, religious and social institutions.[48] It was particularly sig-

41. *See* Drs. Th. J. W. Sneek, *The CSCE in the New Europe: From Process to Regional Arrangement*, 5 Ind. Int'l Comp. L. Rev. 1, 1–6 (1994).

42. *See* Brolmann, *supra* note 34, at 21–27.

43. *See* Gideon A. Moor, *The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and Unmet Responsibilities*, 18 Fordham Int'l L. J. 870, 870–88 (1995).

44. *See id* at 875.

45. *See* Brolmann, supra note 34, at 6–9.

46. *See id.*

47. *See generally* Jacob Robinson et al., Were the Minorities Treaties a Failure? (1943) (discussing in depth the failure of the League Nations minorities system).

48. *See* Brolmann, *supra* note 34, at 82–86.

nificant that the use of their own language was guaranteed in courts and in religious and other public meetings.[49] The main objective of these minority treaties was analyzed by the Permanent Court of International Justice in its advisory opinion on *Minority Schools of Albania*.[50] The court found that treaties were guaranteeing: (1) perfect equality for minorities and citizens; and (2) suitable means for the preservation of the ethnic particularities from their tradition and national characteristics. The minority treaties also guaranteed collective rights for groups of minorities, granting them authorization to petition the League of Nations. The minority treaties only applied to countries where minorities were created by the transfer of territories following the Versailles Peace Treaty System.[51] The affected countries protested the universalization and sought its abolition. Those countries felt that the application of these treaties had a discriminatory impact. The lack of effective enforcement in the League of Nations, compounded by the resistance of the affected states, contributed to the dismal failure of the minority treaties to create an effective agreement for protection of ethnic minorities.[52]

Without any exaggeration, the unsettled international legal status of ethnic minorities can be considered one of the major causes of the second world war, the most devastating destruction in human history, which claimed fifty-five million human lives. Lack of international standards for the protection of ethnic minorities provided ammunition for the emerging fascist powers during the period between the two world wars. It offered justification for an aggressive course of action in the name of protecting ethnic minorities from the oppressive regimes of successor states. The League of Nations tolerated the minority treaty system's gradual collapse in the late 1930s.[53] At the same time, Hitler created an appealing justification for Germany's course of aggressive action in the name of protecting oppressed German ethnic minorities in the infamous Munich Accord, which led to the occupation of Czechoslovakia. The same justification for preserving and protecting German ethnic minorities provided justification for the invasion of Poland, which led to the outbreak of World War II.[54]

From the ashes of the most devastating human tragedy in recent history, a new international legal order emerged in 1945. The United Nations was created to preserve peace and security and prevent any reoccurrence of war. In article 2, paragraph 4 of the U.N. Charter, the use or threat of use of force became illegal and a violation of a peremptory norm. At the same time, a new code emerged in Article 55 of the U.N. Charter, which protected human rights and similar language was employed in the Universal Declaration on Human Rights of 1948.[55]

A greater understanding that human beings individually deserved fundamental rights and protections under international legal orders emerged after World War II. Therefore, specific references cannot be found for the protection of minorities in the U.N. Charter or the Universal Declaration on Human Rights. Learning from the devastating experience of the minority treaty system and the tremendous tragedy of World War II, the international

49. *See id.* at 103.
50. *See* Minority Schools in Albania, PCIj, Ser. A/B, No. 64, 1935, at p. 17.
51. *See* BROLMANN, *supra* note 34, at 85.
52. *See id.* at 86.
53. *See* P. KOVA'CS, INTERNATIONAL LAW AND PROTECTION OF MINORITIES 42–46 (1996).
54. *See id.* at 40–41.
55. *See* John, *supra* note 37, at 545–48.

community was not ready to gamble by extending protection to certain groups of ethnic minorities. So the basic code on the protection of human rights only addressed individuals.[56] The *traveaux preperatoire* reflected the U.N. countries' concern about preventing immigration of any group and protecting the collective rights of minorities. These concerns could threaten a nation's sovereignty and undermine the integration of immigrants.[57]

The Covenant on Political and Civil Rights provides specific protection for individual human rights. Article 27 of this Covenant referred to persons who belong to a group of religious or linguistic minorities. The Covenant provides that minorities shall not be denied the right to enjoy their own culture in their own community with other members of their group, to practice their own religion, and to use their own language.[58] This article, however, also reflects a clear individualistic approach. In other words, no group or collective rights were recognized and protected. It still remains to be seen whether an open-minded interpretation of article 27 of this Convention is forthcoming. Such an open-minded interpretation may lead to an intrinsic recognition and protection of the diversity and cultures of ethnic minorities.[59]

The grand design of the post-1945 world order and the model of international cooperation and protection of the individual in the framework of the United Nations System collapsed in the midst of the Cold War, starting in the late 1940s. This period may be characterized by the failure of the international model to protect the human rights of individuals in their collective capacity.

The collapse of the communist domination of Eastern Europe in 1989 and the resulting emergence of a new global perspective challenged those seeking international protection of individual and collective human rights within systems of nation-states.[60]

IV. Proposal for Personal Self-Determination of Economic Migrants

In the present international legal order, the status of economic migrant has not received any recognition. It is a paradox that the largest numerical immigrant group does not exist in the eyes of the civilized community of nations. It is urgent, therefore, that the invisible faculty of international legal scholars address this unsettled area of international human rights law.[61]

The foundation for the international legal protection of economic migrants can be found in the Code of Human Rights. Articles 55 and 56 of the U.N. Charter contain the premise

56. *See* BROLMANN, *supra* note 34, at 86–98.

57. *See id.* at 99–101,

58. *See id.* at 109–10.

59. *See id.* at 111–13.

60. Michael R. Geroe & Thomas K. Gump, *Hungary and a New Paradigm for the Protection of Ethnic Minorities in Central and Eastern Europe*, 32 COLUM. J. TRANSNAT'L L. 673–77 (1995).

61. *See* William P. Travis, *Migration, Income Distribution, and Welfare Under Alternative International Economic Policies*, 45 LAW & CONTEMP. PROBS. 81, 95–106 (1982); U.N. Convention Relating to the Status of Refugees, *supra* note 1; *see also* James A.R. Nafziger, *A Commentary on American Legal Scholarship Concerning the Admission of Migrants*, 17 U. MICH. J. L. REFORM 165, 167 (1984). Professor Nafziger has urged the "invisible college" of international scholars to look beyond the restrictive confines of treaty law to afford protection for victims of natural and man-made disasters. The status and protection of the economic refugees were not mentioned in the article, however. *See* Gabor, *supra* note 2, at 861–62.

that was later developed further in light of the International Covenant of Economic, Social and Cultural Rights and the subsequent regional conventions[62] This Covenant more specifically outlines the basic rights of economic welfare to which each individual is entitled.

The diverse socioeconomic conditions in the contemporary international community require that the interests of human beings are protected under a historically determined and dynamically developed model of a reasonably assured level of economic expectation, instead of an uncertain international minimum standard. Specifically, such an approach would consider that an individual may be treated as an economic migrant if he or she has a well-founded fear that an entire generation will be deprived of basic economic, social and cultural human rights. The International Covenant on Economic, Social, and Cultural Rights can provide a foundation for using such criteria to determine the nature and extent of these human rights.[63]

An individual should state the specific deprivations that he or she suffers. The individual should show an expectation, within the time of his or her generation, that no significant change or improvement in the economic conditions will occur that would enable the achievement of the ideas set out in the Covenant on Economic, Social, and Cultural Rights. The Covenant should provide the foundation for formulating a minimum standard for the protection of economic migrants. Any gross abuse or violation of these basic economic and social rights could lead to the right of a receiving country to protection alien.

A closer survey of selected provisions of this Covenant can illustrate the threshold of my approach to the legal protection of economic migrants. For instance, article 6 of the Covenant provides:

> The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.[64]

Undoubtedly, the right to work and to earn a decent livelihood is a fundamental one. Each contracting party to the Covenant must provide full realization of this right. The Covenant specifically states that technical training and vocational guidance programs and policies should foster the achievement of economic and social cultural development leading to full and productive employment.[65]

It is most difficult to determine when a state has committed a gross violation of its international legal obligation by depriving an individual citizen of this fundamental human right for a lifetime.[66] Establishing the minimum standard required under this Covenant is

62. *See* International Covenant on Economic, Social, and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967).

The following states are parties: Afghanistan, Australia, Austria, Barbados, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, Cameroon, Canada, Central African Republic, Chile, Columbia, Congo, Costa Rica, Cyprus, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Finland, France, Gabon, Gambia, German Democratic Republic, Federal Republic of Germany, Guinea, Guyana, Honduras, Hungary, Iceland, India, Iran, Iraq, Italy, Jamaica, Japan, Jordan, Kenya, Democratic People's Republic of Korea, Lebanon, Libya, Luxembourg, Madagascar, Mali, Mauritius, Mexico, Mongolia, Morocco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Peru, Philippines, Poland, Portugal, Romania, Rwanda, Saint Vincent and the Grenadines, Senegal, Solomon Islands, Spain, Sri Lanka, Surinam, Sweden, Syria, Tanzania, Togo, Trinidad and Tobago, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Venezuela, Viet Nam, Yugoslavia, Zaire, and Zambia. *See id.*

63. *See id.*

64. *See id.* art. 6(1).

65. *See id.* art. 6(2).

a very frustrating and complex task. In Mexico, for example, the demographic trend of shrinking employment opportunities has resulted in rising unemployment.[67] The United Nations and its specialized organizations need to play a more active role in making a realistic assessment of what constitutes the minimum standard for compliance with the basic economic and social rights in all segments of the divided community of nations.

The next article of the Covenant, article 7, covers a more comprehensive and equally essential set of basic human rights. Article 7 states:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work, which ensure, in particular:
> (a) remuneration which provides all workers, as a minimum with:
> (i) fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
> (ii) a decent living for themselves and their families in accordance with the provisions of the present Covenant;
> (b) safe and healthy working conditions;
> (c) equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
> (d) rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.[68]

Article 7 constitutes the core of basic economic human rights. The plain and ordinary meaning of the words specifically establishes only general and elusive standards.[69] The basic standards of fair wages, equal opportunity in promotions, equal pay for equal opportunity in promotions, and equal pay for equal value of work were accepted by the drafters as a compromise.

The difficulty of formulating precise categories may be demonstrated by applying the test for the definition of economic migrants. If the prevailing standard of article 7 is fairness and Article Fifty Five of the United Nation Charter equality, then a lifetime deprivation of those rights requires a close analysis of the prevailing social and economic conditions of the particular sending country.[70] In a more precise approach, three criteria would have to be satisfied in order to classify an individual as an economic migrant: (1) the gross and persistent violation of an economic right, for instance, abuse of equal pay and working conditions; (2) a hardship and a great detriment resulting from the deprivation of the economic human right; and (3) a reasonable and well-founded expectation that this particular deprivation will continue for at least the generation of the individual. Obviously, this test is only feasible if an individual's status is assessed through a close and penetrating analysis of the socioeconomic condition of the native country at the time that the individual departed.[71]

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66. *See* Animesh Ghoshal & Thomas M. Crowley, *Refugees and Immigrants: A Human Rights Dilemma*, 5 HUM. RTS. Q. 327, 343–46 (Aug. 1983) (focusing on the United States treatment of "politico-economic refugees"). *See also* Gabor, *supra* note 2, at 863–66.

67. *See generally* George C. Shaffer, *An Alternative to Unilateral Immigration Controls: Toward a Coordinated U.S.—Mexico Binational Approach*, 41 STAN. L. REV. 187, 189–94 (Nov. 1988).

68. *See* International Covenant on Economic, Social and Cultural Rights, *supra* note 62, at art. 7.

69. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(1), U.N. Doc. A/CONF. 39–27, 63 A.J.I.L. 875, 8 I.L.M. 679 (1969) (effective Jan. 27, 1980).

70. *See* Ghosshal & Crowley, *supra* note 66, and accompanying text; Shaffer, *supra* note 67, and accompanying text.

The adoption of the aforementioned test for determining the legal status of an economic migrant, therefore, can lead to the international legal protection of this individual. International legal protection can be accomplished by extending the scope of the definition of the status of political refugees to encompass certain segments of the class of economic migrants.[72] Another more realistic alternative would be to pursue international legislation, preferably within the framework of the United Nations, to establish the legal status and protection of economic migrants. Presently, use of the United Nations framework is the only viable alternative to reach immediate solutions under domestic law regimes.

V. Final Remark

The contemporary international legal order has been built on a 350-year old nation-state concept. As we approach a new millennium, the new dimension of global political and economic interdependence calls for the reassessment of the viability of this established concept. The individual human being deserves a new dimension of international legal protection. The national sovereignty premise has to be reconciled with an emerging international legal regime for the protection of the fundamental human rights of individual and ethnic self-determination. The invisible faculty of international legal scholars hopefully will contribute to the intellectual design of such a legal regime.

71. Francis A. Gabor, *The Immigration Reform and Control Act of 1986: An Analysis in the Light of Contemporary International Law*, 23 INT'L LAW. 485, 492–95 (1989).

72. *See id.*